

No. 15850 ✓

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United States  
Court of Appeals  
for the Ninth Circuit

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COLE INVESTMENT CO., a Corporation,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California  
Northern Division.

FILED

MAR 12 1958

PAUL P. O'BRIEN, CLERK



No. 15850

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Court of Appeals  
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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LLOYD J. SEAY,  
5437 Laurel Canyon Blvd.,  
North Hollywood, California.

For Appellee:

PERRY W. MORTON,  
Assistant Attorney General;

ROGER P. MARQUIS,  
HAROLD S. HARRISON,  
Attorneys,  
Department of Justice,  
Washington 25, D. C.;

LAUGHLIN E. WATERS,  
United States Attorney;

RICHARD J. DAUBER,  
Assistant U. S. Attorney,  
821 Federal Building,  
Los Angeles 12, California.





United States District Court, Southern District  
of California, Northern Division

No. 1449-ND Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

20,007.29 ACRES OF LAND, more or Less, and  
A CERTAIN UNPATENTED MINING  
CLAIM, in the County of Kern, State of  
California; MARGARET CLASSELLS WIL-  
SON, et al., and UNKNOWN OWNERS,

Defendants.

### NOTICE OF FILING OF ACTION

To the Defendants Named in Schedule "B" At-  
tached Hereto and Made a Part Hereof and to  
Unknown owners:

You and Each of You Are Hereby Notified that  
a Complaint in Condemnation has been filed in the  
office of the Clerk of the above-entitled court in  
an action to condemn the fee simple title to Tracts  
Nos. F-1103, F-1106, F-1107, F-1120, F-1121,  
F-1128, F-1132, F-1164, F-1165, G-1200, G-1201,  
G-1202, G-1203, G-1209, G-1210, G-1213, G-1214,  
G-1215, G-1216, G-1217, G-1218, G-1221, G-1222,  
G-1224, G-1226, G-1231, G-1238, H-1305, H-1312,  
H-1315, H-1344, J-1402, J-1403, J-1406, J-1407,  
J-1423, J-1424, J-1426, J-1432, J-1437, J-1438,  
J-1441, J-1444, J-1445, J-1447, J-1450, J-1454.

J-1461, K-1515, K-1516, K-1523, K-1528, K-1530, K-1543, K-1548, K-1563, K-1577, K-1578, [2\*] W-3000, FF-3903, FF-3910, FF-3913, FF-3914, FF-3922, FF-3924, FF-3926, FF-3928, FF-3929, and FF-3933, subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipe lines; and

As to Tract L-1-M, all outstanding right, title, and interest of any and all persons claiming any interest whatsoever for mining claims in said tract, subject to existing easements for public roads and highways, public utilities, railroads, and pipe lines, described in Schedule "A" attached hereto and made a part hereof, for public use for the expanding needs and requirements of the Department of the Air Force and other military uses incident thereto.

The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257); the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518, 50 U.S.C. 171), which acts authorize the acquisition of land for military purposes; the Act of Congress approved August 12, 1935 (49 Stat. 610,

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**\*Page numbering appearing at foot of page of original Certified Transcript of Record.**

611; 10 U.S.C. 1343a, b, and c), which Act authorized the acquisition of land for Air Force Stations and Depots; the National Security Act of 1947, approved July 26, 1947 (61 Stat. 495); the Acts of Congress approved June 17, 1950 and January 6, 1951 (Public Laws 564 and 910, 81st Congress), and the Act of Congress approved September 28, 1951 (Public Law 155, 82nd Congress), which acts authorize acquisition of the land, and the Acts of Congress approved September 6, 1950 and January 6, 1951 (Public Laws 759 and 911, 81st Congress), and the Act of Congress approved November 1, 1951 (Public Law 254, 82nd Congress), which acts appropriated [3] funds for such purposes.

You Are Further Notified that if you have any objection or defense to the taking of your property, you are required to serve upon plaintiff's attorneys at the address designated herein within twenty (20) days after personal service of this notice upon you, exclusive of the day of service, an answer identifying the property in which you claim to have an interest, stating the nature and extent of the interest claimed and stating all your objections and defenses to the taking of your property. A failure so to serve an answer shall constitute a consent to the taking and to the authority of the court to proceed to hear the action and to fix the just compensation and shall constitute a waiver of all defenses and objections not so presented.

You Are Further Notified that if you have no objection or defense to the taking, you may serve upon plaintiff's attorneys a notice of appearance designating the property in which you claim to have an interest, and thereafter you shall receive notice of all proceedings affecting the said property.

And You Are Further Notified that at the trial of the issue of just compensation, whether or not you have answered or served a notice of appearance, you may present evidence as to the amount of the compensation to be paid for the property in which you have any interest, and you may share in the distribution of the award of compensation.

Dated: March 22, 1955.

LAUGHLIN E. WATERS,  
United States Attorney;

RICHARD A. LAVINE,  
Assistant U. S. Attorney;

By /s/ RICHARD A. LAVINE,  
Attorneys for Plaintiff. [4]

Schedule "A"

The following described tracts of land aggregate 20,007.29 acres of land, more or less, and are situated in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land [5] Management:

\* \* \*

Tract No. K-1528

The South  $\frac{1}{2}$  of the Northeast  $\frac{1}{4}$  and the East  $\frac{1}{2}$  of the Northeast  $\frac{1}{4}$  of the Northeast  $\frac{1}{4}$  of Section 22, Township 10 North, Range 12 West, San Bernardino Meridian, according to the official plat of the survey of said land approved by the Surveyor General on September 19, 1856, containing 100.00 acres, more or less. [15]

\* \* \*

Schedule "B"

The following named persons are the presumptive owners of, or claimants of an interest in, the property involved in this action: [19]

\* \* \*

K-1528—Cole Investment Company, a California Corporation.

\* \* \*

[Endorsed]: Filed January 6, 1958. [23]

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[Title of District Court and Cause.]

SCHEDULE OF WITNESSES ON BEHALF  
OF (1) FELA HOLZMAN TRACT K-1516;  
(2) COLE INVESTMENT CO. TRACTS  
K-1523 AND K-1528

Pursuant to the Pretrial Order entered herein, defendants Cole Investment Co. (Tracts K-1523



and K-1528, and Fela Holzman (Tract K-1516), herewith submit their Schedule of Witnesses as to Value:

Walter B. Congdon, Appraiser for Tait Appraisal Company.

Tract K-1516, owned by Fela Holzman and described as E $\frac{1}{2}$  of SE $\frac{1}{4}$  of Sec. 15, T10N R12W, inspected on May 29, 1957, and appraised as of March 22, 1955, at \$14,000.00; that details of appraisal consisted of a complete study of the district as to its present and future possibilities for development and use; that its highest and best use is considered to be for subdivision into small acreage tracts for home purposes; that comparable sales in the district have been considered and properties in question inspected; that the property is located close to (only about one mile) to the main Lancaster-Mojave highway and only 8 miles from the city of Mojave, where stores, schools and churches are located; that many of the immediate ranches surrounding this property have been subdivided and are improved with homes, poultry ranches, apartment rentals, etc.; that property is level, with good drainage and a good sandy loam soil; that water is available from wells at very little expense.

Note: Complete and detailed Appraisal report on this property will be submitted to the court at time of trial for consideration. [66]

Fela Holzman, Owner of Above-Described Tract.

That she is a widow with two adult sons; that said property has been held by her family for ap-

proximately 40 years; that she has refused many offers to buy said property for the reason that it has been the intention of herself and sons to develop and improve said property and make their home there at some time in the future; that said property, in her opinion is not less than \$250.00 per acre or a total of \$20,000.00.

Ruth K. Bandy, Re Tracts K-1523 and K-1528.

That she is President of Cole Investment Co., a California corporation, who owns the above-mentioned tracts together with various and sundry other properties in this district and elsewhere; that her father homesteaded in this district many years ago and that various members of her family originally owned various tracts in the vicinity; that the corporation owns the 20-acre ranch home lying adjacent to and west of the subject property; that said ranch has subsequently been developed into 8 rental units bringing a net income of \$536.00 monthly. That on this particular 20 acres a deep well was developed with a large reservoir, and equipped with pump and pipe to irrigate and develop the subject properties taken by the United States; that it was the intention of Cole Investment Co., and the work was commenced prior to the taking, to develop the subject property by constructing residential units thereof for rentals and sales; that since the taking of said lands Cole has had to move its program of development approximately one mile north in a less favorable location and develop water therefor. A number of rental units have been built and are now occupied. That

she is now and has been for many years fully advised as to land values in this area and that the reasonable and fair value of the subject land at the time of taking was not less than \$250.00 per acre, or a total sum of \$30,000.00; that Cole in addition thereto has suffered Net Severance Damage in the sum of \$7,000.00 as per appraisal of Tait Appraisal Company on account of the well, pumps and pipe aforesaid.

Walter B. Congdon, Re the Two Last Mentioned Tracts:

In addition to the facts set forth on page one (1) in connection with Tract K-1516 has appraised the subject property as follows:

Parcel #1.  $S\frac{1}{2}$  of  $NE\frac{1}{4}$  of Sec. 22, T10N R12W, 80 acres @ 200.00, total \$16,000.00.

Parcel #2.  $E\frac{1}{2}$   $NE\frac{1}{4}$  of  $NE\frac{1}{4}$  Sec. 22, T10N R12W, 20 acres @ 175.00, total \$3,500.00.

These properties are designated as Tract K-1528.

Parcel #3.  $E\frac{1}{2}$  of SW NW of Sec. 23, T10N R12W, 20 acres @ 175.00, total \$3,000.00 (Tract K-1523). [67]

That Cole Investment Co., has in addition to the land value, suffered Net Severance Damage in the manner and amounts referred to in the statement of Ruth K. Bandy of page 2 hereof.

Note: A complete appraisal report will be presented to the Court for consideration at the time of trial.



Cecil Minugh, Real Estate Broker, Lancaster, California.

That in addition to the corroboration of the testimony and facts as related to Fela Holzman, Ruth K. Bandy, Walter B. Congdon, he will present evidence that he is a real estate broker with the firm of Hartwig Realty Company of Lancaster, California; that the past several years they have concentrated a portion of their business in the area under question; that they have made a number of sales in the immediate district and are thoroughly familiar with the subject property and know of its highest and best usage; that all of the subject property is highly suitable for subdivision purposes, with ample water at reasonable price and costs, level land with good soil, accessibility to highways, schools, stores and churches; that with water being available all of the subject land could be subdivided into five and ten acre tracts and sold at the present time to net the owners not less than \$400.00 per acre; that as of March 22, 1955, it could have netted the owners not less than \$200.00 per acre.

Dated June 12, 1957.

Respectfully submitted,

/s/ LLOYD J. SEAY,

Attorney for Fela Holzman  
and Cole Investment Co.

[Endorsed]: Filed June 14, 1957. [68]

[Title of District Court and Cause.]

STATEMENT AS TO JUST COMPENSATION  
ON BEHALF OF (1) FELA HOLZMAN  
TRACT K-1516; (2) COLE INVESTMENT  
CO., TRACTS K-1523 AND K-1528

Pursuant to Order and Notice of Pretrial Conference entered herein, defendants Fela Holzman and Cole Investment Co. herewith submit their statement as to Just Compensation.

Tract K-1516, Fela Holzman, E $\frac{1}{2}$  of SE $\frac{1}{4}$  Sec. 15, T10N, R12W.

Fela Holzman, owner of this tract, contends as follows:

(1) That she feels the minimum fair market value, in cash, at the time of taking is \$250.00 per acre, that her appraiser contends that the reasonable value is \$175.00 per acre or a total of \$14,000.00, which latter sum she adopts as the minimum fair market value.

(2) Benefits resulting from the taking. None.

(3) Severance damage. None.

(4) The minimum amount claimed to be due on this tract is the sum of \$14,000.00, less the sum of \$4,000.00 heretofore paid, leaving a balance of \$10,000.00.

Tract K-1523, Cole Investment Co. E $\frac{1}{2}$  of SW NW,  
Sec. 23, T10N, R12W.

Cole Investment Co., owner of this tract, contends:

(1) President Ruth K. Bandy asserts the minimum fair market value, in cash at the time of taking is \$250.00 per acre; that Cole's appraiser has placed a value of \$150.00 per acre or \$3,000.00 for the 20 acres, which latter valuation is adopted as the [69] minimum fair market value.

(2) Maximum amount of conceded benefits.  
None.

(3) Severance damage. Claimed under Tract K-1528.

(4) The minimum amount claimed to be due on this tract is \$3,000.00, less the sum of \$1,100.00 heretofore paid, leaving a balance due in the sum of \$1,900.00.

Tract K-1528, Cole Investment Co.

Cole Investment Co., owner of this parcel, contends:

(1) Lands described as Parcel #1. S $\frac{1}{2}$  of NE $\frac{1}{4}$  Sec. 22, T10N R12W, 80 acres, appraised by Cole's appraiser at \$200.00 per acre or \$16,000.00, and Parcel, #2, E $\frac{1}{2}$  NE NE Sec. 22, T10N, R12W, 20 acres appraised by Cole's appraiser at \$175.00 per acre or \$3,500.00, making a total appraisal for Tract

K-1528 of \$19,500.00. Cole contends that it feels the minimum fair market value for this tract at the time of taking to be \$250.00 per acre or \$25,000.00. However, for the purposes herein set forth Cole adopts the totals as appraised by Cole's appraiser, to wit: \$16,000.00 and \$3,500.00 or a total of \$19,500.00 as the minimum fair market value.

(2) Conceded benefits resulting from taking. None.

(3) The minimum amount of claimed damages proximately resulting from severance is \$7,000.00, detailed as follows:

#### Appraisal of Well, Reservoir, etc.

Well 500' deep, 12" steel casing gravel packed, equipped with 15 HP Byron Jackson pump	
Appraised Value .....	\$ 6,450.00
Open earth constructed Water Reservoir	
Appraised Value .....	400.00
Pipe necessary to carry water from this well to properties being appraised (Overhead System) .....	4,550.00
Pressure Pump for use with above .....	250.00
<hr/>	
Total Appraised Value ....	\$11,650.00

Less Value of material that could be  
sold after abandonment

Well Pump .....\$2,000.00

Pipe (Overhead Sys-  
tem) ..... 2,500.00

Pressure Pump ..... 150.00     \$ 4,650.00

---

Net Severance Damage ....\$ 7,000.00

(4) The minimum amount claimed to be due  
Cole Investment Co. for this tract is: land  
\$19,500.00, severance damage \$7,000.00, total  
\$26,500.00, less the sum of \$8,550.00, hereto-  
fore paid leaving a balance for this tract in  
the sum of \$17,950.00.

### Summary of Balances Claimed to be Due as Just Compensation

Tract K-1516, Fela Holzman .....\$10,000.00

Tract K-1523, Cole Investment Co... 1,900.00

Tract K-1528, Cole Investment Co... 17,950.00

In connection with the last two tracts mentioned,  
and by way of further estimation of values Cole  
Investment Co., if legally possible, if allowed to  
retain the 120 acres, pay to the Plaintiff the sum  
of \$200.00 per acre, including the sums heretofore  
received by Cole from the United States.

Respectfully submitted,

/s/ LLOYD J. SEAY,

Attorney for Fela Holzman  
and Cole Investment Co.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 19, 1957. [71]

United States District Court, Southern District of  
California, Northern Division

No. 1449-ND Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

20,007.29 ACRES OF LAND, MORE OR LESS,  
AND A CERTAIN UNPATENTED MINING  
CLAIM, in the COUNTY of KERN, STATE  
OF CALIFORNIA, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND JUDGMENT

(As to Tracts G-1200, G-1209, G-1210, G-1213,  
G-1214, G-1215, G-1217, G-1221, G-1222,  
G-1224, G-1226, G-1231, H-1305, H-1312, J-1407,  
K-1515, W-3000, G-1203, J-1406, K-1523, K-1528,  
K-1516, J-1423, J-1424, and J-1454.)

The above-entitled eminent domain proceeding with respect to Tracts G-1200, G-1209, G-1210, G-1213, G-1214, G-1215, G-1217, G-1221, G-1222, G-1224, G-1226, G-1231, G-1305, H-1312, J-1407, K-1515, W-3000, G-1203, J-1406, K-1523, K-1528, K-1516, J-1423, J-1424, and J-1454, came on regularly for trial in this court on September 3, 1957, continuing through September 17, 1957, before the Honorable Gilbert H. Jertberg, Judge of the above-entitled court, and a jury of twelve duly qualified



persons empaneled and sworn to try the issues upon the pleadings herein.

Plaintiff appeared by its attorney, Laughlin E. Waters, United States Attorney; by Richard J. Dauber, Assistant United States Attorney. The defendant, Southern Pacific Land Company, a California corporation, appeared by its attorneys E. D. [72] Yeomans, Roger M. Sullivan, Randolph Karr, and Paul V. DeFord, by Roger M. Sullivan. The defendant, Title Insurance and Trust Company, Trustee for Louis J. McGeary, and Trustee for Eleanora D. Sellery, appeared by its attorneys Holbrook, Tarr & O'Neill, by Richard L. Huxtable. The defendants, Virgil O. Rewick, Ruth Elizabeth Rewick, William W. Fowler, and Jeanette B. Fowler, appeared by their attorney Daniel Dougherty. The defendant Cole Investment Company, a California corporation, appeared by its attorney Lloyd J. Seay. The defendant Fela Holzman, appeared by her attorney, Lloyd J. Seay. The defendants M. O. Moore and Elsie L. Moore, appeared by their attorney George J. Stepovich, by Richard V. Aten. The defendants Sylvia Spencer Welch and Richard Vanderhof Aten appeared by their attorneys McCutchen, Black, Harnagel & Green, by Robert A. Fletcher, and Aten & Aten, by Richard V. Aten.

The defendant County of Los Angeles, appeared in writing by its attorney Harold W. Kennedy, County Counsel, by Robert A. Von Esch, Jr., Deputy County Counsel, and on March 13, 1957, filed herein

its Disclaimer as to all tracts involved herein. The defendant County of Kern, appeared in writing by its attorney Roy Gargano, County Counsel, by Kit L. Nelson, Assistant County Counsel, and on April 12, 1956, filed herein its Disclaimer as to all tracts involved in these proceedings insofar as taxes on said tracts are concerned.

Witnesses on the part of plaintiff and defendants were sworn in the case and evidence, both oral and documentary, was introduced upon the issues. The matter was argued by counsel for the respective parties and the jury was instructed by the court; thereupon the jury retired and deliberated and subsequently returned into court and rendered the following verdict:

“We, the jury, find the fair market value of [73] and just compensation for the taking in condemnation, as of March 22, 1955, of the following numbered tracts of land, as each said tract is described in the Complaint in Condemnation on file in this action, to be as follows: [74]

\* \* \*

“Tract K-1528, containing 100 acres, more or less, the sum of \$15,000.00;

\* \* \*

“September 17, 1957.

“GORDON E. BLADE,  
“Foreman.”



And the court, upon the pleadings, evidence and verdict of the jury, and good cause appearing therefor, hereby makes and files the following:

### Findings of Fact

This matter was regularly commenced by plaintiff on [75] March 22, 1955, by filing its Complaint in Condemnation and Declaration of Taking herein to acquire title to the property therein described, including Tracts G-1200, G-1209, G-1210, G-1213, G-1214, G-1215, G-1217, G-1221, G-1222, G-1224, G-1226, G-1231, H-1305, H-1312, J-1407, K-1515, W-3000, G-1203, J-1406, K-1523, K-1528, K-1516, J-1423, J-1424, and J-1454. Plaintiff simultaneously deposited into the registry of this court the following sums for the use of the parties entitled thereto for the taking of the following tracts:

	* * *	
		Deposit
Tract No.		Amount of
K-1528 .....		\$ 8,750.00
	* * *	

During the course of the trial on the issue of just compensation, the defendant Cole Investment Company claimed severance damage by reason of the taking of Tract K-1528. Argument of counsel was heard by the court outside the presence of the jury, and the court finds and concludes that there was no severance damage in law or in fact by virtue of the taking of said Tract K-1528. [78]

Just compensation for the taking of Tract K-1528 is the sum of \$15,000.00, together with interest at the rate of 6% per annum on the sum of \$6,250.00 from March 22, 1955, to the date of deposit of said sum in the registry of the court. The sum of \$8,550.00 heretofore paid by order of court shall be credited against said just compensation. [85]

\* \* \*

There was no severance damage caused by the taking of Tract K-1528 formerly owned by defendant Cole Investment Company, a California corporation.

Based upon the preceding Findings of Fact and Conclusions of Law, it is hereby

Ordered, Adjudged and Decreed that

Plaintiff, United States of America, is entitled to condemn Tracts G-1200, G-1209, G-1210, G-1213, G-1214, G-1215, G-1217, G-1221, G-1222, G-1224, G-1226, G-1231, H-1305, H-1312, J-1407, K-1515, W-3000, G-1203, J-1406, K-1523, K-1528, K-1516, J-1423, J-1424, and J-1454 as described in the Complaint and Declaration of Taking on file herein for the public uses set forth in said Complaint, and title to all of said tracts vested in the plaintiff, United States of America, upon the filing of said Declaration of Taking on March 22, 1955. [86]

\* \* \*

The just compensation for the taking of Tract K-1528 is the sum of \$15,000.00 together with interest at the rate of 6% per annum on the sum of

\$6,250.00 from March 22, 1955, to the date of deposit by plaintiff of said sum of \$6,250.00 plus said interest in the registry of the court.

\* \* \*

Plaintiff, United States of America, is directed to deposit in the registry of the court with respect to the following tracts the following sums representing the deficiencies in the amounts of the deposits heretofore made, together with interest on said sums at the rate of 6% per annum from March 22, 1955, until the date of each respective deposit: [90]

Tract No.	Amount of Deficiency
K-1528 .....	\$6,250.00

\* \* \*

The clerk of this court is directed to disburse and pay out of the registry of the court to Cole Investment Company, a California corporation, the sum of \$15,000.00, together with interest on the sum of \$6,250.00 as aforesaid, less \$8,550.00 heretofore paid, with respect to Tract K-1528. [94]

\* \* \*

The court reserves jurisdiction herein to make such other and further orders, judgments and decrees as may be necessary and proper.

Dated: This 14th day of November, 1957.

/s/ GILBERT H. JERTBERG,  
United States District Judge.

Presented by :

LAUGHLIN E. WATERS,  
United States Attorney ;

RICHARD J. DAUBER,  
Assistant U. S. Attorney ;

By /s/ RICHARD J. DAUBER,  
Attorneys for Plaintiff.

Lodged November 8, 1957.

[Endorsed]: Filed November 14, 1957.

Entered November 18, 1957. [95]

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[Title of District Court and Cause.]

NOTICE OF APPEAL ON BEHALF OF COLE  
INVESTMENT CO. TRACTS K-1528

To Laughlin E. Waters, United States Attorney, and  
Richard J. Dauber, Assistant United States  
Attorney, and the United States of America,  
Plaintiff:

You and each of you will please take notice that the defendant Cole Investment Co., a California corporation (Tract K-1528) intends to and does hereby appeal to the United States Court of Appeals for the Ninth Circuit from a portion of that certain judgment signed and entered in the above-entitled action on November 14, 1947, pursuant to notice that judgment in the above matter was entered, said notice being dated November 18, 1957.

That the portion of said judgment including the Findings of Fact and Conclusions of Law hereby specifically appealed from are described as follows:

A. That portion of the Findings of Fact as set forth on page seven commencing at line 22 and ending with line 28.

B. That portion of the Findings set forth on page fourteen commencing at line 15 and ending with line 20 insofar as [97] it does not include any amount for severance damages only.

C. That portion of the Findings set forth on page fifteen commencing at line 14 and ending at line 16.

D. That portion of the judgment set forth on page nineteen commencing at line 1 and ending at line 5 only insofar as it does not include any compensation for severance damages.

E. That certain ruling made orally by the Court on September 10, 1957, in which the Court rejected the offer of proof with respect to severance damages.

Dated at Los Angeles, California, November 27, 1957.

/s/ LLOYD J. SEAY,

Attorney for Cole Investment  
Co.

Affidavit of service by mail attached.

[Endorsed]: Filed December 2, 1957. [98]

[Title of District Court and Cause.]

### CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 102, inclusive, containing the original:

Notice of Filing of Action.

Schedule of Witnesses on behalf of Fela Holzman and Cole Investment Co.

Statement as to Just Compensation as to Fela Holzman and Cole Investment Co.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal on behalf of Cole Investment Co., Tract K-1528.

Designation of Record on Appeal on behalf of Cole Investment Co., Tract K-1528.

B. Defendant Cole Investment Co., Exhibit "A."

C. One volume of Reporter's Official Transcript of proceedings had on:

September 10, 1957.

I further certify that my fee for preparing the foregoing record amounting to \$1.60 has been paid by appellant.



Dated: January 7, 1958.

[Seal]                      JOHN A. CHILDRESS,  
   Clerk;

By /s/ WM. A. WHITE,  
   Deputy Clerk.

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In the United States District Court, Southern  
District of California, Northern Division  
No. 1449-ND—Civil

UNITED STATES OF AMERICA,  
   Plaintiff.  
   vs.

20,007.29 ACRES OF LAND IN THE COUNTY  
OF KERN, STATE OF CALIFORNIA, etc.,  
et al.,  
   Defendants.

Honorable Gilbert H. Jertberg, Judge Presiding.

REPORTER'S TRANSCRIPT  
OF PROCEEDINGS

(Tracts K-1523 and K-1528 Cole Investment Co.)

Outside Presence of Jury

Appearances of Counsel:

For the Government:

LAUGHLIN E. WATERS,  
United States Attorney; By  
RICHARD J. DAUBER,  
Asst. United States Attorney.

For the Defendant Cole Investment Co.:  
LLOYD SEAY, ESQ.

Tuesday, September 10, 1957, 4:00 P.M.

(The following proceedings were had after the jury retired:)

The Court: Let the record show the jury has retired from the courtroom. I might state for those in attendance I am going to consider at this time certain phases of the Cole Investment Company property, being tracts K-1523 and K-1528, so anyone here who is not interested in those tracts of course need not stay. If there are any witnesses here relating to these other tracts, they are directed to return tomorrow morning at 9:30.

All right, Mr. Seay, we will proceed on this matter.

Mr. Seay: May it please the Court, it is the contention of Cole, and we have and are making claim for severance damage, based upon the fact that tract K-1528 has always been since the acquisition of the property considered by Cole and the Bandys as part of the 20 acres, which is known as the Bandy Ranch, lying to the west of the Lone Butte Road. Back in around '48 it was the intention of Bandy and Cole——

Mr. Dauber: Your Honor, may I interrupt. I am sorry, I don't mean to interrupt, but are we going to have Mr. Seay just argue the point and testify as to intention?

The Court: No, I gather this is a presentation of Mr. Seay's contention with respect to severance damage.



Mr. Dauber: I see. I am sorry I interrupted. [2\*]

Mr. Seay: In the event the Court determines otherwise, I would certainly then make an offer of proof, with the Court's permission.

In other words, the 100 acres lying to the east of Sopp Road and the 20 acres—I mean the Lone Butte Road, and the 20 acres to the west of Lone Butte Road, as far as the owners are concerned, is a tract of land. True there was an easement created through there, which is now designated as Lone Butte Road. It is my understanding that it was never a dedicated road. It was developed and put in there by the predecessor, or grandparents or parents of Mrs. Bandy, for their own convenience, and not for the purpose of separating the two tracts.

Now, in the course of and during the ownership a well was drilled. Now there is already, I believe, existing the domestic water wells on the property, and at the present time there are two, on the west 20 acres to the west of Lone Butte Road.

In about 1948, their plan was to develop and farm the 100 acres across the road, and in connection with that they drilled a deep well, which I understand is 500 feet deep, and proved to be of sufficient size to furnish water to the 100 acres to the east along Lone Butte Road. They purchased and installed a pump, and the necessary bowls and motor and everything in connection with it. [3]

After the water was developed, and they had ample water, they caused to be developed adjacent

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

to the well a reservoir, which was intended to be used in connection with the irrigation of the 100 acres across to the east.

According to our appraiser, we have a valuation of the well and the pump as at the time it was developed—I don't know whether that would be cost at the present time—but our appraiser has fixed a value of the well and pump at \$6,450; the reservoir at \$400; all of which is located on the 20 acres to the west of the property, or to the west of the 100 acres in question.

Now, the Bandys acquired pipe to carry the water over to the condemned property, which, according to the appraiser, cost at the time \$4,550.

In addition to that it was necessary to buy a pressure pump, which is used for overhead sprinkler irrigation, and on which the appraiser has placed a value of \$250, giving us a total appraised value of the property which we claim severance damage for of \$11,650.

Now, I might say since it became general knowledge that the property might be taken the Bandys—I might add further their tenant who was doing this work, when he learned of the possibility of the taking of the 100 acres, abandoned the farming project. Prior to that time he had cleared out and got ready for cultivation the 80 acres, the south 80 acres of [4] the 100 acres, with the exception of that 20 acres which extends to the north.

As I say, the tenant at that time abandoned the project, and as a result of that we have no further use for the well, except to utilize it to some extent,

but the purpose for which it was developed has been taken away from us, or the use for which it was developed has been taken away from us. So we no longer need that big well. We couldn't afford to operate it for the purposes of domestic water. Besides that, we have two other wells, ample to take care of that, including the necessary shrubbery irrigation.

So as a result of that, we are stuck with a pump, to which the appraiser has given as of the date of taking a salvage value of \$2,000. The pipe and overhead system, which I understand practically all of it has been disposed of, but at the time of the condemnation the appraiser has given the pipe the valuation of \$2,500; likewise the pressure pump of \$150. In other words, what we have which we no longer can use and the loss occasioned thereby totals \$4,650.

Now, taking the \$4,650 leaves what we claim for those items alone, \$7,000.

Now, another question comes to mind here. It is my understanding, and the proof will show, what is now designated as Lone Butte Road at the time of the taking was never a dedicated road. It consisted of a 20-foot trail or easement [5] which traversed from the south end of the property on up a mile or two to the north. It is my understanding that since the property was condemned and taken by the government that a question arose, which was serious to the Bandys, as to whether or not they were taking and legally the title description took in what was then known as the easement,

which is now designated as Lone Butte Road. No title had been conveyed.

They were then alarmed as to how much the government would take. If they took it over to the fence then the 20-acre Bandy Ranch would be left without an easement to get to the highway. They took the problem up with the various and sundry officials in the army bases in Washington, Baltimore, resulting in the government granting to the county all the rights to the existing easement plus ten feet which gave up to the Bandy line 30 acres——

The Court: You mean 30 feet.

Mr. Seay: Thirty feet, and then it became necessary, in order to carry out the road program, it became necessary for the Bandys to dedicate and deed to the county an additional 30 feet, before they could get any co-operation from the county.

Now, all of that negotiation and all those transactions took place since the date of the taking, and at the time we had a right to go across the property with our irrigation, we [6] had no interference from any source, I should say. That was our intention and our plan.

Now, a slight other claim which we had in mind was the cost of removal of the fence, which is a steel fence embedded in concrete, which we would have to move back the required 30 feet. As the Court knows and everybody observed, there is a border of trees. Our severance damage in that connection would be the cost of removing the fence and replanting the trees, which I believe has been



intimated as about \$500. Also by reason of the necessity, we would lose approximately one acre of land, which testimony would show would be valued at approximately \$1,000 per acre.

However, in going further in what I anticipated the record would show, would be that the appraiser would probably show that the road dedication and the creation of a 60-foot road would approximately increase the valuation of the property to the extent of the value of the land actually taken from the Bandy Ranch, so I think that would become a nullity.

But we seriously urge the right to present the damage with reference to the well and pipe and casing, the right to use which has been taken away from us, and as I say, for a period from 1948 up to the actual date of taking, the Court and everyone knows personal property of this nature is naturally going to decrease in value, and unless we are permitted to use it we have suffered a loss, based upon some [7] figure to be determined by the Court and jury, and in view of those facts we feel that we are entitled to present to the jury the question of severance.

The Court: Well, Mr. Seay, first, with respect to the 20 acres, known as the Bandy headquarters, located on the east side of the Lone Butte Road, is there any claim that the fair market value of that 20 acres has been affected or suffered by the taking of the 100 acres?

Mr. Seay: No.

The Court: Now, as I understand your state-

ment, all of the personal property, the pressure pump, the well, the reservoir, and the pipe, are located on the 20 acres, that is the Bandy headquarters?

Mr. Seay: Yes, the pump and the booster pump was located on this property, and we had the pipe to conduct it over to the 100 acres all during this time. However, I understand it has since been disposed of.

The Court: Yes. Well, what I was interested in, on the date of taking all of the property you speak of, was located on the Bandy headquarters?

Mr. Seay: That is right.

The Court: Now, at any time did the plan of a unitized operation of the 100 acres and the 20 acres get beyond the stage of planning? Did it ever get beyond the stage of planning? [8]

Mr. Seay: I would say this in this way, your Honor: Experimental crops were planted on the 20 acres, a very small amount of some six or eight or ten crops, to determine—well, in other words, they were experimenting to see what would grow and what the possibilities were. They did determine that, and then, as I say, they had a tenant who was going across the road, and he leveled out and cleaned it out and got it in preparation—there was no leveling to do, but he got it ready.

The Court: But water was never conveyed across the road from the reservoir or pumped to the 80 acres?

Mr. Seay: To my knowledge it wasn't conveyed

over there for the purpose of growing any crops. There might have been some test runs to see the contours of the land and level in the preparation for eventual distribution of water.

The Court: I see. Now, it is my understanding of the testimony of Mrs. Bandy, and also Mr. Congdon, that the highest and best use of the 100 acres was for desert home sites.

Mr. Seay: That is right.

The Court: Now, with respect to the Lone Butte Road, it is my understanding that generally when the government takes it takes subject to reservations and easements and rights of way, so legally, when the government filed its declaration of taking, the taking was subject to that prescriptive right, or whatever it was, a prescriptive right or an easement there. [9]

Now, as I understand it, as a result of a conference between the Bandys and the federal government and the county, the government deeded to the county 30 feet, if the 20-foot easement was included.

Mr. Seay: I might make an observation at this point, your Honor. As far as the county is concerned, of course they know the easement was there, and they knew that the Base was taking it subject to the easement, because of those allegations and the statements, I believe, in the complaint. However, the county, even though they knew the easement was there, they would not construct this road to the protection of the Bandys, or take any steps until they had a clearance from the government,

plus the easement right, they had to have title to it. They demanded that, and through a year of negotiations they acquired it by giving up 30 feet on the other side.

The Court: The Bandys, in other words, deeded to the county 30 feet on their side, so to speak, on the east side of Lone Butte Road, and the government finally conveyed 30 feet on the west side of the road.

Mr. Seay: That is right.

The Court: Giving a 60-foot road there. Well, I think I understand the situation.

Mr. Dauber, do you have anything to say at this stage? [10]

Mr. Dauber: No, except, your Honor, as it has been shown here in the testimony that there was no unitized use and there was no before and after difference in valuation, and also it might be pointed out, although it has not been shown and it is very possible the government did not have an obligation to convey any property for the purpose of a roadway, still the government did convey a 30-foot strip to the county in order that access might be retained to the Bandy Ranch. Other than that I have no comments.

Mr. Seay: I think, your Honor, under the case of *People vs. Thompson*, 43 Cal. (2d) page 17, in 1954, that where there is no actual diversity of use of the property any easement of the road will not destroy the contiguity. In other words, unity of use, mere failure to use some of the property does not constitute diversity of use. I am sure the Court is



familiar with that case, and we submit that applies in this instant case.

The Court: Well, it is my view, Mr. Seay, under the contentions as presented, and my view of the law, federal law dealing with severance that there is no severance damage in this case for which the owners are entitled to compensation. And I would rule, if the witnesses testified along the lines you suggested, that their testimony couldn't properly go before the jury.

Now, in order for you to preserve your record, I am [11] perfectly willing for you to make an offer of proof as to what the witnesses, if called, would testify to, so that your record would be preserved in the event I am wrong and the higher court reviews the matter.

Mr. Seay: Well, let me put it this way, it may shorten it: I have heretofore made a broad statement on the matter, as to what the witnesses would testify, to wit, Mrs. Bandy on behalf of Cole, and Mr. Congdon as the appraiser, and without repeating the entire matter, I would present as my offer of proof the statement which has been heretofore made by me for the Court's consideration.

The Court: Do you have anything to say in relation to that offer of proof, Mr. Dauber?

Mr. Dauber: No, your Honor.

Mr. Seay: Will you stipulate that if the witnesses were sworn that our testimony would be substantially in the form of the statement as presented by me?

Mr. Dauber: Well, I don't believe that it is

necessary for me to stipulate to that, is it, your Honor? He is making his offer of proof.

The Court: No, I think not. In other words, you offer to prove that those witnesses would if sworn in this case testify substantially as outlined in your contentions?

Mr. Seay: I believe that covers it.

The Court: And I assume that if they were asked by Mr. [12] Dauber the same questions that I asked you, that their answers would be substantially the same as your answers?

Mr. Seay: That is so.

The Court: All right. Well, then, the Court will reject the offer of proof with respect to severance damage.

(Discussion by Mr. Dougherty as to judicial notice, and adjournment at 4:30 p.m.) [13]

### Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct partial transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Fresno, California, this 12th day of  
September, 1957.

/s/ HELEN G. SCHULKE,  
Official Reporter.

[Endorsed]: Filed December 2, 1957. [14]

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[Endorsed]: No. 15850. United States Court of  
Appeals for the Ninth Circuit. Cole Investment Co.,  
a Corporation, Appellant, vs. United States of  
America, Appellee. Transcript of Record. Appeal  
from the United States District Court for the  
Southern District of California, Northern Division.

Filed January 8, 1958.

Docketed January 15, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

